Real Estate Transactions Cases, Notes and Materials (6th Preliminary Edition)

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VOLUME V

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CHAPTER XXXVII THE POWER OF PRIVATE SALE

(a) Introduction

All standard mortgage forms in use in Ontario contain a power of private sale; that is, a power permitting the mortgagee to sell the property after the mortgagor's default. The wording of these powers varies; some are quite short, and others are elaborate. The following sample is quite brief, but otherwise representative:

> Provided that the said Mortgagee, on default of payment for one month, may on two weeks' notice enter on and lease or sell the said lands. And provided also that in case default be made in payment of either principal or interest and such default continue for two months after any payment of either falls due, the Mortgagee may exercise the foregoing powers of leasing or sale, or either of them without any entry or notice.

In the unlikely event that a mortgage does not contain a power of sale, The Mortgages Act, R.S.O. 1970, c. 279 implies one in the following terms:

> 23. Where any principal money is secured by mortgage of land, the mortgagee, at any time after the expiration of three months from the time of default in the payment of any moneys due under the mortgage or after any omission to pay any premium of insurance that by the terms of the mortgage ought to be paid by the mortgagor, has the following powers to the like extent as if they had been in terms conferred by the mortgage:
>
> > 1. A power to sell, or to concur with any other person in selling, the whole or any part of the mortgaged property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to buy in at an auction and to rescind or vary contracts for sale, and to resell the land, from time to time, in like manner without being answerable for any loss occasioned thereby.

Powers of this nature appeared in England in the eighteenth century. At first there was some concern whether they offended the prohibitions against restrictions on the right to redeem. Their validity was established in the early nineteenth century; they soon came to be included in virtually all mortgages, and eventually they were given the legislative approval reflected in section 23 of The Mortgages Act. Now, in England, they are used far more often than foreclosure or foreclosure and sale. They are severely curtained or forbidden in most of the states of the United States.

CHAPTER XXXVIII MARSHALLING AND CONSOLIDATION

(a) Introduction

The materials in this Chapter offer a brief glimpse at two equitable doctrines. The doctrines are applicable very infrequently, however they are most important to parties who are able to take advantage of them. "Marshalling" refers to a number of technical doctrines designed to ensure equitable apportionment of mortgage debts where more than one parcel of land or more than one person are liable on a mortgage debt. "Consolidation" refers most basically to the doctrine that a mortgage creditor who holds security in two parcels of land owned by his debtor, in respect of different mortgage loans may require the debtor who wishes to rely on his equitable right to redeem after the legal redemption date, to redeem both mortgages or neither: "He who seeks equity must do equity".

The diversity of the problems that can arise, the varying fact situations in which the doctrines (particularly marshalling) may be applicable, and the infrequency of the practical relevance of these doctrines, makes extensive treatment impractical here. For further consideration of these issues see:

Falconbridge on Mortgages 4th ed. (1977), at pp. 185-193, 309-316.
Osborne, Mortgages 2nd ed. (1970), at pp. 198-201, 579-586.

(b) Marshalling

ERNST BROTHERS CO. v. CANADA PERMANENT MORTGAGE CORPORATION (1920), 47 O.L.R. 362 (High Ct.)

[In 1912, Frank and Jeremiah McAsey executed a mortgage to the defendant company of one lot owned by one of the brothers, and another lot owned by the other brother. The mortgage secured $1,200, of which $1,000 was advanced to Frank and $200 to Jeremiah. Both brothers acknowledged the receipt of the whole sum and covenanted for its repayment. In 1914, Frank charged his lot in favour of the plaintiffs to secure a loan received from them. Two years later he conveyed his property to his brother for $1,500. The conveyance made no mention of either the defendant's mortgage or the plaintiff's charge, although the evidence indicated that Jeremiah had agreed to pay off both encumbrances. He never paid anything to the defendant and the defendant proposed to exercise its power of sale on both parcels. Only Frank's lot was sold however. The proceeds did not cover the amount of either the defendant's mortgage or the plaintiff's charge. The plaintiffs brought an action for a declaration that the securities held by the defendant should be marshalled.]

PART (g) looks at such miscellaneous topics as insurance of condominiums, realty tax assessment and potential liability of unit owners.

PART (h) considers what results follow if there is destruction of the building or if termination of condominium ownership is desired.

(a) Introduction

William K. Kerr "Condominium -- Statutory Implementation" (1963), 38 St. John's L.R. 1.

> . . . Condominium is a combination of two kinds of ownership: one, the ownership in severalty of a part of a building, generally called the apartment; the other, undivided ownership in common (co-dominion) with the owners of other apartments, of the "common elements," that is, the land and those parts of the building intended for common use, such as the foundations, columns, main walls, roofs, halls, corridors, lobbies, stairways, elevators, entrances, utility services and the like. The undivided ownership is in a fixed ratio, generally that which the value of the apartment bears to the value of the entire property at the time the condominium is established.
>
> Under condominium, apartments in a building acquire the attributes of separate parcels of real estate: they may be separately owned, conveyed, devised, inherited and mortgaged and the deeds and mortgages are recordable. The apartments are separately assessed and taxed for ad valorem real estate taxes. Thus the owner of the apartment is solely responsible for the mortgage charges and taxes on his unit, and it is only the remaining charges which he shares with the other apartment owners. This sharing is in the ratio of his co-ownership of the common elements.

Irwin Davis, "Condominium and the Strata Titles Act" (1966), 6 Can. B.J. 469.

> . . . *Historical Background*
>
> Whether the idea of individual ownership of parts of a building goes as far back "as the hills of Rome"[5] may be open to some doubt — and there seems little authority for the suggestion except a remark in the Digest of Justinian — but it has existed for many hundreds of years. The best historical review of the subject is to be found in an article by J. Leyser[6] in which he points out that in the Twelfth Century ownership of floors and even rooms in the hands of different persons was quite common in some German cities. He feels that excessive

CHAPTER XL

PROFESSIONAL RESPONSIBILITY

(a) Introduction

In this Chapter, we will take a very brief glance at material that could and in many places, would, constitute a small part of a separate course on "The Legal Profession". The materials are necessarily skeletal, and are tailored to raise the issues in the context of real estate transactions, so far as it is possible to do. Problems of the professional responsibility of lawyers, of the appropriate bounds of the lawyers' monopoly, of informed access to and choice of legal services, and of the response of lawyers, legislators, regulators and others to such difficult issues are raised in the Chapter. The resolution of these problems in a manner acceptable to you personally is a challenge that should face you forever.

Pirsig and Kirwin, Cases and Materials on Professional Responsibility (3rd ed., 1976) at p. 3.

1. MEANING OF "PROFESSION"

WADE, PUBLIC RESPONSIBILITIES OF THE LEARNED PROFESSIONS

21 La.L.Rev. 130 (1960).

What do we mean when we speak of the learned professions? Ordinarily, we think we are referring to certain common callings of a traditionally dignified character. We think of law, medicine, the ministry and teaching. The concept of learned professions developed during the Middle Ages. It came in with the rise of the universities. They had a faculty of arts, and a faculty of theology, law and medicine. Teachers, church officials, lawyers, and physicians received prolonged formal training, and after they had completed this training they constituted a class apart. Since that time, there has been a consistent viewpoint that training is necessary to admission to a learned profession, and that the professions are based on an intellectual technique. Sometimes this training is prescribed by the state. The state licenses the admission to the particular learned professions—all, that is, except ministers, for reasons which are obvious. • • • State licensing has come about gradually through standards set up by professional organizations.

This suggests a second attribute of the learned professions organization. In the beginning these organizations or associations were